

Decision No. R24-0622

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24G-0053TO

COLORADO PUBLIC UTILITIES COMMISSION,
COMPLAINANT,

v.

REGINALD BERRY,
RESPONDENT.

**RECOMMENDED DECISION
ASSESSING CIVIL PENALTY**

Issued Date: August 30, 2024

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I. STATEMENT, SUMMARY AND PROCEDURAL HISTORY¹**A. Statement and Summary**

1. For the reasons discussed below, this Decision finds that the Colorado Public Utilities Commission Trial Staff (“Staff”) met its burden of proof as to both Counts in Civil Penalty Assessment Notice No. 138933 (“CPAN”) filed in this Proceeding and assesses civil penalties and surcharges against Reginald Berry (“Mr. Berry” or “Respondent”) of \$1,000 for those violations.²

B. Procedural History³

2. On February 1, 2024, Staff initiated this matter by filing the CPAN alleging that Respondent violated §§ 40-1-10.1-401(1)(a) and 40-10.1-107(1), C.R.S., on November 21, 2023, and should be assessed a total civil penalty of up to \$13,915.00 for those violations.⁴

3. On April 24, 2024 the Public Utilities Commission (“Commission”) referred this matter by minute entry to an administrative law judge (“ALJ”) for disposition.

4. Staff and Respondent are the only parties to this Proceeding.⁵

5. With the parties’ input, the ALJ scheduled a remote evidentiary hearing on the merits of the CPAN for July 23, 2024, and established procedures and deadlines relating to that hearing.⁶

6. The ALJ held the evidentiary hearing on July 23, 2024 as noticed. All parties appeared. During the hearing, Commission Investigator Joseph Potts (“Investigator Potts”)

¹ Headers in this Decision are for ease of reference only.

² In reaching this Decision, the Administrative Law Judge (“ALJ”) has considered and weighed all evidence and arguments presented, including those discussed briefly or not at all.

³ Only the procedural history necessary to understand this Decision is included.

⁴ Hearing Exhibit 2.

⁵ See Decision No. R24-0333-I (mailed May 17, 2024).

⁶ Decision No. R24-0364-I at 7 (mailed May 30, 2024)

testified for Staff and Mr. Berry testified on his own behalf. Hearing Exhibits 1 and 2 were admitted into evidence during hearing.⁷

7. Neither party filed a Statement of Position.

II. FINDINGS, ANALYSIS, AND CONCLUSIONS

A. Factual Findings

8. On December 6, 2023, Detective Jeremy Cover with the Jefferson County Sheriff's Office (Sheriff) contacted Investigator Potts about his investigation into a motor vehicle theft in which a tow truck was used. This initiated Investigator Potts's investigation as to whether Mr. Berry or his company, Precision Towing and Recovery, LLC ("Precision Towing" or "Company") violated Commission Rules or statutes.⁸

9. Investigator Potts learned that on November 21, 2023, Alex Oliver ("Oliver") requested that Mr. Berry tow a vehicle (a 2009 Nissan Rogue) that had been parked for some time in front of his home at 13309 E. Idaho Place, Aurora, Colorado. In text message exchanges with Oliver, Mr. Berry told Oliver that he would tow the vehicle once he confirmed that it was not reported as stolen.⁹

10. On November 21, 2023, after confirming that the vehicle was not reported as stolen, Mr. Berry paid Oliver \$100 for the vehicle and towed the vehicle or caused it to be towed. He sold the vehicle to Advanced Auto Recycling for \$350. Mr. Berry did not receive proof from Oliver that Oliver owned the vehicle or had authority to operate or control it. The vehicle was later

⁷ These exhibits were electronically received into evidence during the hearing, and added to the record by administrative staff on the date of the hearing, July 23, 2024.

⁸ Investigator Potts located records at the Colorado Secretary of State indicating that Mr. Berry and his company, Precision Towing had an active business license with the state.

⁹ Hearing Exhibit 1 at 2. Mr. Berry provided Investigator Potts the referenced text messages.

reported as stolen. This initiated the Sheriff's investigation, which resulted in Investigator Potts's investigation.

11. Investigator Potts searched Commission records for a towing permit and proof of financial responsibility (*i.e.* proof of insurance) for Mr. Berry and Precision Towing. He found none.

12. In January 2024, Investigator Potts spoke with Mr. Berry about the subject tow.¹⁰ When they spoke, Mr. Berry admitted that neither he nor his Company have a Commission-issued towing carrier permit.

13. On February 1, 2024, Investigator Potts issued the CPAN and personally served it on Mr. Berry at the Denver address that Mr. Berry provided him when they spoke.

14. Mr. Berry owns and operates Precision Towing. During the hearing, Mr. Berry admitted that he performed the tow at issue in the CPAN; that neither he nor his Company had a Commission-issued towing permit at the time; and that neither he nor his Company caused proof of financial responsibility to be filed with the Commission when the subject tow was performed.

15. Mr. Berry explained that he was connected to Oliver through Frank's Junk Car portal, where the public can report junk vehicles to be towed. Mr. Berry paid \$10 to the portal for the lead to Oliver. When Mr. Berry sold the car to Advanced Auto Recycling, he did not provide proof of ownership, but did provide a bill of sale from Oliver.

16. Mr. Berry admitted fault, apologized, and took responsibility for his actions. While he did not offer excuses for his actions, he explained that they were the result of being uneducated on requirements relating towing and selling abandoned vehicles. He vowed not to repeat any of his mistakes, including selling a vehicle without proof of ownership and operating without a permit

¹⁰ Detective Cover provided Mr. Berry's name and phone number to Investigator Potts.

or proof of financial responsibility on file with the Commission. In fact, in February 2024, not long after speaking with Investigator Potts, Mr. Berry applied for and obtained a Commission towing carrier permit and caused proof of financial responsibility to be provided to the Commission.¹¹ He explained that a penalty in the full amount requested would be difficult for him to manage but reiterated that it is important for him to be responsible for his actions.

17. During the hearing, Staff requested that Mr. Berry be ordered to cease and desist operations until he complies with the relevant statutes. At the same time, Staff did not contest Mr. Berry's testimony that he obtained a towing carrier permit in February 2024 and caused proof of financial responsibility to be provided to the Commission. Indeed, on cross-examination, Staff merely confirmed with Mr. Berry that although he obtained a permit in February 2024, he did not have one when he performed the subject tow in November 2023.¹²

B. Commission Authority and Burden of Proof

18. Under § 40-7-101, C.R.S., the Commission has both the authority and responsibility to enforce the provisions of article 10.1 of title 40, Colorado Revised Statutes. Commission enforcement personnel have authority to issue CPANs per § 40-7-116, C.R.S., for violations of provisions in article 10.1 of title 40, §§ 40-7-112 and 113, C.R.S.¹³

19. Staff bears the burden of proof by a preponderance of the evidence.¹⁴ This standard requires the fact finder to determine whether the existence of a contested fact is more probable

¹¹ The evidence was unclear as to whether the permit is in Mr. Berry's or Precision Towing's name. This Decision refers to the permit as Mr. Berry's for ease of reference only and is not intended to be a factual finding that the permit is issued in his name, rather than his Company's name. In any event, based on the circumstances in this case, it makes no difference whether Mr. Berry obtained the permit in his or his Company's name.

¹² Staff was also given the opportunity to dispute this evidence by presenting rebuttal evidence but did not do so..

¹³ See §§ 40-7-113(1) and 116, C.R.S.; Rule 6018(a), of the Commission's Rules Regulation Transportation by Motor vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6.

¹⁴ §§ 40-7-116(1)(d)(II); § 24-4-105(7), C.R.S.; Rule 6018(c), 4 CCR 723-6; Rule 1500, 4 CCR 723-1.

than its non-existence.¹⁵ The preponderance of the evidence standard requires “substantial evidence,” which is defined as such relevant evidence as a reasonable person’s mind might accept as adequate to support a conclusion, and enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.¹⁶

C. Service and Notice Requirements

20. Staff must serve a CPAN on the named respondent; this may be accomplished by certified mail or by personal service.¹⁷

21. The CPAN’s content must provide adequate notice of the alleged violations.¹⁸ As relevant here, a CPAN must include: the name and address of the person cited; a citation to the specific statute or rule alleged to have been violated; a brief description of the alleged violation, including the date and approximate location of the alleged violation; the maximum penalty amounts for the violation, including any surcharge imposed per § 24-34-108(2), C.R.S.; the date of the notice; a place for the respondent to sign to acknowledge receipt and liability for the CPAN; and other information as may be required by law to constitute notice of a complaint to appear for hearing if the penalty is not paid within ten days.¹⁹

D. Findings, Analysis, and Conclusions

22. It is undisputed that Mr. Berry’s towing operations are subject to requirements in article 10.1 of title 40, Colorado Revised Statutes. Because the CPAN alleges violations of §§ 40-1-10.1-401(1)(a) and 40-10.1-107(1), C.R.S., against someone bound to comply with those

¹⁵ *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985).

¹⁶ *See, e.g., City of Boulder v. Pub. Utilis. Comm’n.*, 996 P.2d 1270, 1278 (Colo. 2000) quoting *CF&I Steel, L.P. v. Pub. Utilis. Comm’n.*, 949 P.2d 577, 585 (Colo. 1997).

¹⁷ § 40-7-116(1)(b), C.R.S.

¹⁸ § 40-7-116(1), C.R.S. *See* § 24-4-105(2)(a), C.R.S.

¹⁹ § 40-7-116(1)(b), C.R.S. *See* Rule 6018(b), 4 CCR 723-6.

statutes, the ALJ concludes that the Commission has specific jurisdiction and authority over this matter, and that the CPAN is authorized.²⁰

23. The ALJ finds that the CPAN provides proper notice of the alleged violations because it includes Respondent's name and address; cites the specific statutes alleged to have been violated; includes a brief description of the alleged violations, including the date and approximate location of the alleged violation; identifies the maximum penalty for the alleged violations, including the surcharge imposed per § 24-34-108(2), C.R.S.; includes the date of the notice; and provides place for Respondent to sign to acknowledge receipt and liability for the CPAN and violations alleged therein.²¹ The ALJ also finds that the preponderance of the evidence establishes that the CPAN was served on Respondent by personal service on February 1, 2024. For the reasons discussed, the ALJ concludes that the CPAN provides adequate notice of the alleged violations and was properly served on Respondent, consistent with § 40-7-116(1)(b), C.R.S., and Rule 6018(b), 4 CCR 723-6.

24. Turning to the merits of the CPAN, Count 1 alleges that on November 21, 2023, Respondent operated or offered to operate as a towing carrier in intrastate commerce without first having obtained a permit when Mr. Berry towed a vehicle from 13309 E. Idaho Place, Aurora, Colorado, in violation of § 40-10.1-401(1)(a), C.R.S.²² Section 40-10.1-401(1)(a), C.R.S., states that a person "shall not" operate or offer to operate as a towing carrier in intrastate commerce without first obtaining a towing carrier permit from the Commission.

25. The evidence was undisputed that on November 21, 2023, Mr. Berry towed a vehicle from the address in the CPAN without first having obtained a towing carrier permit from

²⁰ See §§ 40-7-116(1), C.R.S.; Hearing Exhibit 2.

²¹ Exhibit 2; § 40-7-116(1)(b), C.R.S.; Rule 6018(b), 4 CCR 723-6.

²² Hearing Exhibit 2 at 1.

the Commission.²³ Indeed, Mr. Berry admitted to doing this and accepted responsibility for his actions.²⁴ For the reasons and authorities discussed, the ALJ finds that Staff met its burden to prove by a preponderance of the evidence that Respondent committed the violation alleged in Count 1.

26. CPAN Count 2 alleges that on November 21, 2023, Respondent failed to maintain and file evidence of financial responsibility with the Commission while acting as a towing carrier, in violation of § 40-10.1-107(1), C.R.S.²⁵ Section 40-10.1-107(1), C.R.S., requires motor carriers to “maintain and file” with the Commission evidence of financial responsibility in such sum and for such protection as the Commission may require.

27. The evidence was undisputed that Respondent did not have proof of financial responsibility (*i.e.* insurance) on file with the Commission when he towed the subject vehicle on November 21, 2023.²⁶ As noted, Respondent admitted this violation and accepted responsibility for it. For the reasons and authorities discussed, the ALJ finds that Staff met its burden to prove by a preponderance of the evidence that Respondent committed the violation alleged in Count 2.

E. Civil Penalty Assessment

28. Having adjudicated Mr. Berry liable for the violations alleged in the CPAN, the ALJ considers the appropriate civil penalty to assess.²⁷ The maximum civil penalty for Count 1, violation of § 40-10.1-401(1)(a), C.R.S., with the authorized 15 percent surcharge, is \$1,265.²⁸ The maximum civil penalty for Count 2, violation of § 40-10.1-107(1), C.R.S., with the authorized 15

²³ *Supra*, ¶¶ 9-11, 14-15. See Hearing Exhibit 1.

²⁴ *Supra*, ¶¶ 14-15.

²⁵ Hearing Exhibit 2 at 1.

²⁶ *Supra*, ¶¶ 11 and 16.

²⁷ See Rule 6018(e), 4 CCR 723-6 (Commission may assess a civil penalty up to the amount specified in statute or in Commission rules after adjudicating a respondent liable for a violation).

²⁸ § 40-7-113(1)(b), C.R.S., (providing for an \$1100 penalty for violation of § 40-10.1-401(1)(a), C.R.S.); § 24-34-108(2), C.R.S. (authorizing 15 percent surcharge).

percent surcharge, is \$12,650.²⁹ As such, the Commission may assess a maximum total of \$13,915 for the CPAN's violations.

29. In determining the appropriate civil penalty, the Commission considers evidence relating to the nature, circumstances, and gravity of the violation; the degree of respondent's culpability; respondent's history of prior offenses; respondent's ability to pay; respondent's good faith efforts to achieve compliance and to prevent future similar violations; the effect of a penalty on respondent's ability to continue in business; the size of respondent's business; and such other factors as equity and fairness may require.³⁰

30. This case presents numerous mitigating and some aggravating factors. As discussed, Mr. Berry admitted the violations, apologized for them, vowed never to repeat them, and made it clear that he wished to take responsibility for his actions. He did not make excuses for his actions or attempt to shift blame or responsibility onto anyone else. He made good faith efforts to achieve compliance with the relevant statutes and to prevent future similar violations. Specifically, he obtained a towing carrier permit and caused proof of financial responsibility to be filed with the Commission soon after speaking with Investigator Potts and learning that he needed to do so. Mr. Berry is commended for taking responsibility for his actions, and for coming into compliance with the relevant statutes soon after becoming aware that he was not in compliance. Staff provided no evidence indicating that Mr. Berry or his Company have a history of prior similar violations (or any other violations). But there is evidence that assessing the maximum amount will create a hardship on Respondent and his business. All of this supports a much lower assessment than the maximum amount.

²⁹ § 40-7-113(1)(a), C.R.S.; Rule 6018(e), 4 CCR 723-6. *See* Exhibit 2.

³⁰ Rule 1302(b), of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

31. On the other hand, Mr. Berry's actions resulted in a vehicle being reported and investigated as stolen and depriving the vehicle's owner or operator of the use and enjoyment of the vehicle, whether temporarily or permanently.³¹ These are serious impacts which cannot be overlooked.

32. When presenting its case, Staff inexplicably failed to disclose the mitigating evidence³² that Mr. Berry obtained a Commission towing carrier permit and caused proof of insurance to be filed in February 2024.³³ To the contrary, Staff specifically asked for a cease and desist order, implying that Staff had reason to believe that violations may continue unless a cease and desist order is issued. In identifying an appropriate civil penalty, the ALJ considers this.

33. In determining the appropriate civil penalty, the ALJ attempts to strike a reasonable balance between the impact of Mr. Berry's actions on the vehicle's owner or operator; Mr. Berry's unqualified willingness to take responsibility for his actions; his timely good faith efforts to achieve compliance with the relevant statutes and prevent future similar violations; the impact of a civil penalty on Mr. Berry and his business; and other factors relating to equity and fairness, including those discussed above. Having considered evidence on the factors in Rule 1302(b), 4 CCR 723-1, the evidence as a whole, and the unique circumstances here, ALJ assesses Mr. Berry a total civil penalty of \$1,000 for both CPAN Counts, which includes the 15 percent surcharge.³⁴ While this is significantly less than the maximum the Commission could assess, it is still sizable.

³¹ There was no evidence as to whether the vehicle was returned to its owner or operator.

³² Respondent obtaining a Commission towing permit and causing proof of insurance to be filed shortly after speaking with Investigator Potts is evidence relating to a mitigating factor that the Commission considers per Rule 1302(b), 4 CCR 723-1.

³³ Staff would be wise to present mitigating evidence of a similar nature that it is aware of in future CPANs. This is particularly the case where, as here, Staff asks for a cease and desist order, which implies that Staff had reason to believe that violations are continuing. Given that Respondent obtained a permit and provided the Commission proof of insurance, the violations in the CPAN were not continuing. In any event, the Commission strives to encourage compliance with statutes and regulations, and Staff's investigation in this Proceeding accomplished this goal.

³⁴ As set forth in the ordering paragraphs below, Staff has discretion to work with Mr. Berry on payment arrangements (*e.g.*, a payment plan).

Indeed, the assessed penalty and surcharge is more than four times the amount that Mr. Berry made when he sold the vehicle (*i.e.*, \$240),³⁵ which purges Mr. Berry of that profit, deters him from future similar violations, and appropriately penalizes him for the proven violations given the unique circumstances here.

34. As noted, Mr. Berry obtained a Commission towing permit (for him or his Company) and caused proof of insurance to be filed with the Commission in February 2024. Staff presented no evidence indicating that Mr. Berry or his Company's permit was later revoked or suspended, or that he or his Company failed to maintain proof of currently effective financial responsibility since February 2024. Put differently, Staff did not present evidence indicating that the violations alleged in the CPAN were continuing. For these reasons, the ALJ finds that the preponderance of the evidence does not support issuing a cease and desist order and declines to issue one.

35. In accordance with § 40-6-109, C.R.S., the ALJ transmits to the Commission the record in this proceeding along with this written recommended decision and recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Consistent with the above discussion, Reginald Berry ("Respondent" or "Mr. Berry") is adjudicated as having committed the statutory violations in Counts 1 and 2 in Civil Penalty Assessment Notice No. 138933 ("CPAN") in this Proceeding. As explained above, Mr. Berry is assessed total a civil penalty and surcharge of \$1,000 for the violations in CPAN Counts

³⁵ This amount is calculated by deducting the \$100 Mr. Berry paid to Oliver and the \$10 referral fee he paid to Frank's Junk Car portal from the \$350 that Mr. Berry received for selling the vehicle.

1 and 2. This amount represents the total civil penalty assessed for the violations plus the 15 percent surcharge authorized by § 24-34-108, C.R.S.

2. Mr. Berry must pay the total amount due within 60 days of the date that this Recommended Decision becomes the decision of the Commission, if that is the case, or within such lesser or greater amount of time agreed-upon between Mr. Berry and Colorado Public Utilities Trial Staff (“Staff”). Mr. Berry and Staff are directed to work together to facilitate Mr. Berry paying the assessed amount and may agree to a payment plan.

3. This Proceeding is closed.

4. The Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

6. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

7. If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

8. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded. Responses to exceptions are due within seven days of the date exceptions are served.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge